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No. 90-1069

In the Supreme Court of the United States

OCTOBER TERM, 1990

SOUTH HALF OF LOT 7 AND LOT 8, BLOCK 14, KOUNTZE'S 3RD ADDITION TO THE CITY OF OMAHA, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1955(d), which provides for the forfeiture of "[a]ny property, including money" used in violations of Section 1955, authorizes the forfeiture of real property.

2. Whether the procedures used to effect the seizure of the property in this case violated the Fourth, Fifth or Eighth Amendments.

3. Whether 18 U.S.C. 1955(d) allows for forfeiture only after a criminal conviction.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 38-45) is reported at 910 F.2d 488. The panel opinion of the court of appeals (Pet. App. 11-37) is reported at 876 F.2d 1362. The opinions of the district court (Pet. App. 1-10) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1990. On October 18, 1990, Justice Blackmun extended the time in which to file a petition for a writ of certiorari to and including December 31, 1990, a day the clerk's office of this Court was closed. The petition for certiorari was filed on January 2,

1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 1988, the United States filed 13 complaints seeking forfeiture of 13 parcels of real property in Omaha, Nebraska. The complaints alleged that the owner of each property "was engaged in the conducting, financing, managing, supervising, directing and owning all or part of an illegal gambling business," in violation of 18 U.S.C. 1955. Pet. App. 12. The complaints also alleged that each property "was used for the purpose of conducting, financing, managing, supervising, directing and owning all or part of an illegal gambling business," in violation of the same statute. *Ibid.* On the basis of these allegations, the clerk of the United States District Court for the District of Nebraska issued warrants for the arrest of that property in each case. Subsequently, the United States Marshal seized the properties. *Id.* at 13.

2. Persons and financial institutions asserting an interest in the properties filed claims to the properties in the district court. In addition, claimants to all but two of the properties filed motions to dismiss the forfeiture complaints on the ground that the forfeiture provisions of Section 1955(d) do not provide for the forfeiture of real property. Pet. App. 2; Gov't C.A. Br. 2.

On August 1, 1988, the district court dismissed all of the forfeiture complaints.[1] Pet. App. 1-6. The court held that Section 1955(d), which provides for

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[1] Although two of the claimants to the seized property had not filed motions to dismiss the forfeiture actions, the court, "[i]n the interest of judicial economy," also dismissed these complaints. Pet. App. 6.

the forfeiture of "[a]ny property, including money, used in violation" of Section 1955,[2] does not authorize the forfeiture of real property used in illegal gambling enterprises. The court noted that Congress had amended two other statutes (RICO and the Continuing Criminal Enterprise (CCE) statute), which were enacted at the same time as Section 1955 and contained similarly worded, general forfeiture provisions,[3] to state that the forfeiture of real property is authorized. The district court interpreted Congress's failure to enact a similar amendment to Section 1955(d) as proof that Congress had not originally intended to permit the forfeiture of real property under that statute. The district court subsequently denied a motion for reconsideration. Pet. App. 7-10.

3. A panel of the court of appeals affirmed. Pet. App. 11-37. The panel rejected the district court's conclusion that Congress's failure to amend Section

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[2] Section 1955(d) provides in relevant part:

> Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizures, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions.

[3] Both statutes provided for the forfeiture of "any interest * * * in * * * property * * * of any kind." 18 U.S.C. 1963(a); 21 U.S.C. 848(a)(2).

1955(d) at the same time that it amended the RICO and CCE forfeiture provisions explicitly to cover real property revealed a legislative intent to exclude real property from forfeiture under Section 1955(d). Pet. App. 18-20. The panel also rejected petitioners' argument that the incorporation by Section 1955(d) of customs law forfeiture procedures, which apply to personal property, demonstrates Congress's intent to limit Section 1955(d) to forfeitures of such property. Pet. App. 17-18.

The panel recognized that the government had a "powerful" argument that the statute's plain language extended to the forfeiture of real property. Pet. App. 16. It nevertheless found, *id.* at 25, that there was legislative history indicating that Section 1955(d) was intended as "a means of seizing the 'equipment or money used in the operation of' an illegal gambling business" prohibited under section 1955."[4]

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[4] The panel relied on an exchange between Senator McClellan, the Chairman of the Senate subcommitte considering the original version of Section 1955(d), and the Assistant Attorney General for the Criminal Division of the Department of Justice. Senator McClellan suggested to the Assistant Attorney General that "a forfeiture provision that would cover the equipment, adding machines, and money used in operating the illegal [gambling] business establishment" would be "helpful" in achieving the purpose of the statute. See Pet. App. 21-22 (quoting *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 397 (1969)). The Assistant Attorney General agreed, and the Department of Justice subsequently proposed legislation that became Section 1955(d).

In the alternative, the panel held (Pet. App. 26-34) that the procedures employed by the government to obtain forfeiture of the defendant properties violated the Constitution. The panel decided that the Fourth Amendment and the Due Process Clause of the Fifth Amendment require that a judicial officer make a finding of probable cause before the issuance of a warrant authorizing the seizure of property—a procedure that was not followed in this case.

Judge Fagg dissented (Pet. App. 34-37). He argued that the plain meaning of the phrase "[a]ny property" unambiguously encompassed real property, and he found that the legislative history of Section 1955(d) failed "unquestionably [to] show[] a clear statement of contrary intent." Pet. App. 35. Judge Fagg criticized the majority for addressing the issue of whether the procedures used to seize the defendant property were constitutionally defective on the ground that the issue "was not raised in the parties' motions to dismiss or considered by the district court." *Id.* at 37.

4. The Eighth Circuit granted rehearing en banc, vacated the panel decision, and reversed the district court. Pet. App. 38-45. The en banc court held (*id.* at 39) that "[t]he language of the forfeiture provision is plain and clear: real property used in illegal gambling operations may be seized and forfeited." The court rejected the panel's view that the legislative history of Section 1955(d) showed a "clearly expressed legislative intention" to limit the reach of the forfeiture provision to personal property and money. Pet. App. 39 (quoting *United States* v. *James*, 478 U.S. 597, 606 (1986)). The court acknowledged that Senator McClellan's remark on the desirability of depriving gamblers of the tools of their trade had provided the impetus for the enact-

ment of a gambling forfeiture provision. The court concluded, however, that the Senator's remarks, made as they were during "an isolated encounter between one senator and an assistant attorney general in the early stages of the legislative process," were "inconclusive" and did not justify disregard of the unambiguous and plain language of the forfeiture section. Pet. App. 40-41. The court remanded to the district court for further consideration of the government's forfeiture complaints.[5] *Id.* at 43.

In dissent (Pet. App. 43-45), Judge Heaney, joined by Chief Judge Lay and Judge McMillian, stated that the district court's decision should be affirmed for the reasons set forth in the panel opinion. *Id.* at 43. The dissent urged as an alternative ground for affirmance that the procedure employed in seizing the property was inadequate under the Fourth Amendment. Pet. App. 44-45.

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[5] The court did not discuss whether the procedure used to seize the properties satisfied Fourth and Fifth Amendment requirements.

ARGUMENT

1. Petitioner's argument (Pet. 8-17) that Section 1955(d) does not authorize the forfeiture of real property is without merit. The only other court of appeals to consider the issue has agreed with the court below in construing Section 1955 to reach real property. See *United States* v. *Premises & Real Property at 614 Portland Avenue*, 846 F.2d 166 (2d Cir. 1988) (per curiam). Further review is therefore unwarranted.

a. The court of appeals correctly concluded that the language of Section 1955(d), which authorizes the forfeiture of "[a]ny property," plainly extends to real property. As the court of appeals found, "[w]hen used without qualification, the word 'property' includes both real and personal property within its sweep." Pet. App. 39 (citing *Fidelity & Deposit Co.* v. *Arenz*, 290 U.S. 66, 68 (1933)). In addition, Congress' choice of the word "any" to modify "property" indicates that it intended a broad construction of that term. See *United States* v. *James*, 478 U.S. 597, 605 (1986).

Where, as here, the language of the statute is unambiguous, "judicial inquiry is complete except in rare and exceptional circumstances." *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 604 (1991) (citing, *inter alia*, *Burlington Northern R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987); *TVA* v. *Hill*, 437 U.S. 153, 187 (1978)). In this instance, application of the plain terms of the statute does not produce a result "demonstrably at odds with the intentions of its drafters," *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). There is therefore no occasion for the courts to look beyond the plain language of

Section 1955, which unambiguously authorizes forfeiture of the property at issue here.

b. In any event, whatever the merits of the claim that Section 1955(d) does not reach real property, that issue is not ripe for review by this Court. The court of appeals sitting en banc remanded to the district court for further proceedings on the government's forfeiture complaints. If, after further proceedings on remand, the district court orders forfeiture of petitioners' property, and the court of appeals affirms, petitioners will then be able to raise their claim concerning the proper interpretation of Section 1955(d) in a petition for certiorari to this Court. If, on the other hand, further proceedings establish that the instant properties are not subject to forfeiture, then the claim will be moot, and this Court's consideration of the question that petitioners urge this Court to decide will be unnecessary.

2. Petitioners also argue (Pet. 18-27) that the procedures used by the government in seizing the property in this case violated the Fourth, Fifth, and Eighth Amendments and (Pet. 27-29) that forfeiture under Section 1955(d) is criminal in nature and cannot be effected if there has been no criminal conviction.

As Judge Fagg noted in his dissent from the panel opinion of the court of appeals, these arguments were neither raised nor considered in the district court, Pet. App. 37. Moreover, neither the district court nor the court of appeals sitting en banc addressed the constitutional arguments[6] or the contention that for-

[6] Although petitioners argued in their initial brief before the court of appeals that "property owners, and interested third parties" must be afforded pre-seizure notice and an opportunity to be heard, Pet. C.A. Br. 17, they did not make

feiture under Section 1955(d) is criminal in nature. Review by this Court of these issues is therefore unwarranted. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (Court does not review claims not considered by lower courts).

With regard to whether the seizures at issue violated the Fourth or Fifth Amendment, petitioners make two separate arguments before this Court (see Pet. 18-23): that the Fifth Amendment requires notice and an opportunity for a hearing prior to the seizure of real property for forfeiture; and that a judicial determination of probable cause is required under the Fourth and Fifth Amendments before real property can be seized. Although there is some disagreement among the courts of appeals with regard to the first issue, compare *United States* v. *A Single Family Residence*, 803 F.2d 625, 631-632 (11th Cir. 1986) (no need for notice or judicial hearing prior to seizure of real property) with *United States* v. *Property at 4492 South Livonia Road*, 889 F.2d 1258, 1265 (2d Cir. 1989) (notice and an opportunity for a hearing required before real property may be seized), this case is not the appropriate vehicle for its resolution, as the en banc court did not rule on the issue. There is no disagreement among the courts of appeals—and petitioner does not contend that there is—on the distinct, but related, question of whether there must be a pre-seizure judicial determination of

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the distinct argument that a judicial determination of probable cause is required under the Fourth or Fifth Amendment before property may be seized for forfeiture. See Pet. App. 37 (Fagg, J., dissenting). That argument made its first appearance in petitioners' Brief in Opposition to Defendant-Appellee's Petition Entered [*sic*] for Rehearing with Suggestion for Rehearing En Banc at 9-11, chiefly in the form of extensive quotation from the panel opinion.

probable cause. There is therefore no reason for the Court to review that issue at all, let alone to do so in a case in which the court of appeals did not address or decide it.

Moreover, because none of the constitutional issues raised by petitioners were resolved by the en banc court of appeals, petitioners are free to present their constitutional objections again to the district court on remand, and, if that court decides to order forfeiture, to the court of appeals. Thus, review by this Court of these contentions would be premature at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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